

**Office of Chief Counsel
Internal Revenue Service
memorandum**

CC:SB:6:OKL:GL-103006-02
BKMeneely

date: MAR 26 2002

to: Mike Birdsong
IRS Oklahoma Governmental Liaison MS 1020 OKC

from: Associate Area Counsel (SB/SE)

subject: **Victims of Terrorism Tax Relief Act of 2001
Questions and Answers**

This memorandum responds to your request for assistance dated February 25, 2002. This memorandum should not be cited as precedent.

You requested an advisory opinion on a number of questions that have arisen since enactment of the above legislation. Attached please find the our response to your questions in a question and answer format.

You also requested advice on specific taxpayers and that advice will follow shortly.

If you have any questions, please do not hesitate to contact Attorney Bruce Meneely at extension 4831.

/S/ MICHAEL J. O'BRIEN

MICHAEL J. O'BRIEN
Associate Area Counsel (SB/SE)

cc: Area Counsel (SB/SE)

**Victims of Terrorism Tax Relief Act of 2001
Questions and Answers**

1. Will interest be paid on KITA claims for taxes paid, or treated as paid, under section 692(d)(1) or (2)?

Interest will generally be paid on overpayments stemming from KITA claims under section 692(d)(1) or (2). IRM 21.6.6.4.23.1.3.1 contains specific instructions for the computation of interest on KITA claims. The interest rules are summarized below.

The normal interest rules contained in I.R.C. § 6211 apply unless otherwise specified.

The "make-up" or minimum benefit payment established by section 692(d)(2) is considered paid on the date of enactment of the Act, i.e. January 23, 2002.

Interest will not begin to be computed prior to the filing of a return with respect to a victim who had a filing obligation prior to enactment of the Act.

Interest will begin to run for a victim who did not have a filing requirement from the date of the make up payment, i.e. January 23, 2002.

The following scenarios taken from the IRM illustrate the above rules:

Example #2--- An Oklahoma City victim dying in 1995 had income tax withholding payments for tax years 1994 and 1995 in excess of \$10,000 and is entitled to a refund of all income taxes paid for those years. Timely returns were filed for both tax years.

Solution---Interest on payments relating to 1994 and 1995 would begin to accrue on April 15, 1995 and 1996, respectively.

Example #3---An Oklahoma City victim dying in 1995 had income tax withholding payments for tax years 1994 and 1995 that amounted to \$7,500 (i.e., less than \$10,000) in total. Timely returns were filed for both tax years.

Solution---Interest on withholding payments relating to 1994 and 1995 would begin to accrue on April 15, 1995 and 1996, respectively. Interest on \$2,500 (the make-up payment) would begin to accrue on January 23, 2002.

Example #4---An Oklahoma City victim dying in 1995 had income tax withholding payments for tax years 1994 and 1995 that amounted to \$7,500 (i.e., less than \$10,000) in total. Delinquent returns were filed on January 2, 1998, for both tax years reporting a total tax liability for both years of \$6,000. In 1998 the IRS refunded the \$1,500 overpayment without interest because the refund was made within 45 days of the return date. Subsequent to the enactment of the Act, refund claims are filed seeking a refund of the \$6,000 paid, plus a make-up payment of \$4,000 (i.e., \$10,000 less \$6,000 in tax paid).

Solution---Interest on the \$6,000 in tax previously paid for 1994 and 1995 would begin to accrue on January 2, 1998, the date the delinquent returns were filed. Interest on the make-up payment of \$4,000 would begin to accrue on January 23, 2002.

Example #5---An Oklahoma City victim dying in 1995 was a child who owed no tax and had no filing obligation.

Solution---Interest on \$10,000 (the make-up payment) would begin to accrue on January 23, 2002, the date of enactment of the Act.

Example #6---An Oklahoma City victim dying in 1995 had a filing obligation but no one filed a return for the 1995 tax year prior to January 23, 2002. For tax year 1995, the victim had withholding tax of \$4,000. For tax year 1994, the victim made payments amounting to \$2,500 and filed a timely return.

Solution---Interest with respect to the payments for 1994 (\$2,500) accrues from April 15, 1995. Interest with respect to tax year 1995 is computed from the date that a claim for refund is filed on both the \$4,000 and the make-up payment of \$3,500.

2. Can a KITA claim be filed if no return has previously been filed?

Yes. Section 101(d)(2) of the Act makes it clear that a terrorist victim can file a claim for refund, whether or not a return was previously filed, anytime prior to January 22, 2003, one year from the date of enactment. Section 101(d)(2) of the Act provides as follows:

WAIVER OF LIMITATIONS. --If refund or credit of any overpayment of tax resulting from the amendments made by this section is prevented at any time before the close of the 1-year period beginning on the date of the enactment of this Act by the operation of any law or rule of law (including res judicata), such refund or credit may nevertheless be made or allowed if claim therefor is filed before the close of such period.

This is also made clear in Publication 3920, on page 7, where special instructions for filing claims for refund are given.

3. Can the Service setoff or credit any overpayment that results from a KITA claim against other unpaid taxes or other non-tax liabilities?

Yes. KITA claims under section 692(d), either tax previously paid or the minimum benefit amount, generate overpayments. I.R.C. § 6402(a) provides that an overpayment may be credited against any unpaid internal revenue tax. The Service has discretion regarding whether to offset overpayments against other internal revenue tax debts.

Section 6402(a) also provides that an overpayment must be setoff against any unpaid child support obligation, any unpaid federal debt (other than a tax debt) or certain state income tax obligations. Offsets under section 6402(c), (d) and (e) are mandatory.

4. Is a taxpayer's federal tax debt (business or personal) extinguished upon death?

No. A tax debt, whether business or personal, arises when the tax is assessed. If the taxpayer neglects or refuses to pay the tax, a lien arises and attaches to all of the taxpayer's property or rights to property. The lien, which arises upon

assessment of the tax, continues until the liability is satisfied or becomes unenforceable by reason of lapse of time. I.R.C. §§ 6321 and 6322. A tax generally remains collectible for ten years after it is assessed. I.R.C. § 6502. A tax debt can be extinguished earlier than ten years by operation of law, such as by an offer in compromise or a bankruptcy discharge. Death does not extinguish a tax debt.

Tax debts of decedents need to be considered in two different respects. There is the taxpayer's personal liability for the debt. This liability will, in a sense, pass or become the responsibility of the taxpayer's probate estate upon death. The executor or administrator of the probate estate is charged with the responsibility of gathering or collecting all of the decedent's assets, paying all of the decedent's debts and distributing the decedent's property in accordance with the decedent's will or, in the absence of a will, in accordance with the statutes dealing with intestate succession. An executor or administrator can become personally liable for the decedent's tax debt if the administrator fails to properly discharge his or her probate duties.

If a notice of tax lien has been filed, the lien may continue to encumber the decedent's property long after death and even after the conclusion of a probate proceeding.

5. Who should file a KITA claim on behalf of a victim of the Oklahoma City Bombing?

If the victim was a minor, the KITA claim should be filed by the minor's court appointed personal representative or guardian, if one has been appointed. If no personal representative or guardian has been, or will be appointed, the KITA claim should be filed by the parents of the minor.

If the victim was an adult who did not file a joint income tax return for the year covered by the KITA claim, the KITA claim should be filed by the court appointed personal representative or by the victim's heirs.

If the victim was an adult who filed a joint income tax return for the year covered by the KITA claim, the KITA claim should be filed by the decedent's court appointed personal representative or by the surviving spouse. If the spouse is deceased, the KITA claim should be filed by the spouse's court appointed personal representative or the spouse's heirs.

A KITA claim, like any other claim or return, must be filed by someone having legal capacity to file it and the claim must be filed with proof of the representative capacity. Treas. Reg. § 301.6402-2(e) provides:

(e) Proof of representative capacity. If a return is filed by an individual and, after his death, a refund claim is filed by his legal representative, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the legal representative to file the claim. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter a refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made in the claim showing that the return was filed by the fiduciary and that the latter is still acting. In such cases, if a refund is to be paid, letters testamentary, letters of administration, or other evidence may be required, but should be submitted only upon the receipt of a specific request therefor. If a claim is filed by a fiduciary other than the one by whom the return was filed, the necessary documentary evidence should accompany the claim. A claim may be executed by an agent of the person assessed, but in such case a power of attorney must accompany the claim.

Under Oklahoma law, property of a person passes to the heirs upon death, subject to the control of the district court and possession of any personal representative appointed by that court for purposes of administration. Okla. Stat. Ann. tit. 84, § 212 (West 1990). When the decedent is a minor, the property must also pass through guardianship. In re Estate of Hibdon, 228 P.2d 154 (Okla. 1924).

Treas. Reg. § 1.6012-1(a)(4) provides that the return of a minor must be made by the minor himself or must be made for him by his guardian or other person charged with the care of the minor's person or property. Treas. Reg. § 1.6012-3(b)(3)

provides that a fiduciary acting as the guardian of a minor must make the return of income. Rev. Rul. 82-206, 1982-2 C.B. 356, provides that a minor is responsible for making his or her own return. If for any reason, he or she is unable to do so, the parent or guardian is responsible for making the return. The parent should sign the child's name in the proper place followed by the words "By (signature) Parent (or guardian) for minor child."

Rev. Rul. 73-366, 1973-2 C.B. 408 provides that a claim for refund or credit of income tax by an estate discovered after the estate has been finally terminated may be made by either a single claim filed by all beneficiaries or by individual claims filed by each beneficiary in proportion to the tax paid by his or her share. See also Pettengill v. United States, 253 F.Supp. 321, 322 (N.D. Ill. 1966) (sole beneficiary of the estate succeeded by operation of law to whatever refund claims the estate may have originally have had); Campbell Farming Corp. v. United States, 132 F. Supp. 216 (Ct. Cl. 1955) (the final distribution of the assets of the estate constituted an assignment by operation of law and estate lost any interest in the claims for refund).

I.R.C. § 6013(a)(3) provides, with one exception, that in the case of the death of one spouse or both spouses, the joint return with respect to the decedent may be filed only by the executor or administrator. Section 6013(a)(3) also provides that in the case of the death of one spouse, a joint return may be filed by the surviving spouse for the decedent if no return has been made by the decedent for that year and no executor or administrator has been appointed before the end of the tax year. Because the surviving spouse has the authority to file the original income tax return, the surviving spouse should also have the authority to file a KITA claim with respect to that same return.

Based on the above, the Service recognizes the right of parents of a minor, the guardian of a minor, a court appointed personal representative and a decedent's heirs to file returns and claims for refund on behalf of deceased taxpayers. In addition, section 6013(a)(3) authorizes a surviving spouse to file a return or claim under specified circumstances. The KITA claims should be accompanied by Forms 56 or 1310 where there is a fiduciary relationship or where no executor or administrator is appointed. See IRM 3.13.222.12(2) and Pub. 559.

6. If the parents of a child killed in the Oklahoma City Bombing are now divorced, who is entitled to the KITA overpayment?

The fact that the parents are now divorced has no legal effect on who is entitled to file the KITA refund claim. The court appointed personal representative or guardian should file the KITA claim and would be responsible for distributing the overpayment in accordance with Oklahoma law. If there is no court appointed personal representative or legal guardian, the parents should file the claim.

In the absence of a will, property of a decedent passes pursuant to the intestate succession statute. Okla. Stat. Ann. tit. 84, § 213 (West 1990). Under section 213, each of the child's parents are entitled to one-half of the decedent's property, which would include the KITA refund. A copy of the intestate succession statute is attached for your information.

7. In what name will the refund check be issued where the spouse of the victim is now remarried?

The KITA refund check will be issued in the name or names of the person or persons who file the claims. Both Forms 56 and 1310 contain a line for the name of the fiduciary or person claiming the refund. If the person claiming the refund uses her current name on the Forms 56 or 1310, that is the name that should be used on the check. See IRM 3.13.222.12.

Okla. Stat. Ann. tit 84, § 213 (West 2000)

§ 213. Descent and distribution

A. Prior to July 1, 1985, if any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner:

First. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third ($1/3$) to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation: Provided, that if the decedent shall have been married more than once, the spouse at the time of death shall inherit of the property not acquired during coverture with such spouse only an equal part with each of the living children of decedent, and the lawful issue of any deceased child by right of representation. If the decedent leave no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living or one child living, and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation.

Second. If the decedent leave no issue, the estate goes one-half ($1/2$) to the surviving husband or wife, and the remaining one-half ($1/2$) to the decedent's father or mother, or, if he leave both father and mother, to them in equal shares; but if there be no father or mother, then said remaining one-half ($1/2$) goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. If decedent leave no issue, nor husband nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares: Provided, that in all cases where the property is acquired by the

joint industry of husband and wife during coverture, and there is no issue, the whole estate shall go to the survivor, at whose death, if any of the said property remain, one-half (1/2) of such property shall go to the heirs of the husband and one-half (1/2) to the heirs of the wife, according to the right of representation.

Third. If there be no issue, nor husband nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if the deceased, being a minor, leave no issue, the estate must go to the parents equally, if living together, if not living together, to the parent having had the care of said deceased minor.

Fourth. If the decedent leave no issue nor husband, nor wife, nor father and no brother or sister is living at the time of his death, the estate goes to his mother to the exclusion of the issue, if any, of deceased brothers or sisters.

Fifth. If the decedent leave a surviving husband or wife, and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife.

Sixth. If the decedent leave no issue, nor husband, nor wife, and no father or mother, or brother, or sister, the estate must go to the next of kin in equal degree, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claimed through the nearest ancestors must be preferred to those claiming through an ancestor more remote.

Seventh. If the decedent leave several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent, descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

Eighth. If, at the death of such child who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the

issue are in the same degree of kindred to the child, they share the estate equally, otherwise, they take according to the right of representation.

Ninth. If the decedent leave no husband, wife, or kindred, the estate escheats to the state for the support of common schools.

B. Beginning July 1, 1985, if any person having title to any estate not otherwise limited by any antenuptial marriage contract dies without disposing of the estate by will, such estate descends and shall be distributed in the following manner:

1. If the decedent leaves a surviving spouse, the share of the estate passing to said spouse is:

a. if there is no surviving issue, parent, brother or sister, the entire estate, or

b. if there is no surviving issue but the decedent is survived by a parent or parents, brother or sister:

(1) all the property acquired by the joint industry of the husband and wife during coverture, and

(2) an undivided one-third (1/3) interest in the remaining estate, or

c. if there are surviving issue, all of whom are also issue of the surviving spouse:

an undivided one-half (1/2) interest in all the property of the estate whether acquired by the joint industry of the husband and wife during coverture or otherwise, or

d. if there are surviving issue, one or more of whom are not also issue of the surviving spouse:

(1) an undivided one-half (1/2) interest in the property acquired by the joint industry of the husband and wife during coverture, and

(2) an undivided equal part in the property of the decedent not acquired by the joint industry of the husband and wife during coverture with each of the

living children of the decedent and the lawful issue of any deceased child by right of representation;

2. The share of the estate not passing to the surviving spouse or if there is no surviving spouse, the estate is to be distributed as follows:

a. in undivided equal shares to the surviving children of the decedent and issue of any deceased child of the decedent by right of representation, or

b. if there is no surviving issue, to the surviving parent or parents of the decedent in undivided equal shares, or

c. if there is no surviving issue nor parent, in undivided equal shares to the issue of parents by right of representation, or

d. if there is no surviving issue, parent, nor issue of parents, but the decedent is survived by one or more grandparents or issue of any grandparent, half of the estate passes equally to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of any paternal grandparent if both paternal grandparents are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation and the other half passes to the maternal relatives in the same manner; but if the decedent is survived by one or more grandparents or issue of grandparents on only one side of the family, paternal or maternal, the entire estate shall pass to such survivors in the manner set forth in this subsection, or

e. if there is no surviving issue, parent, issue of parents, grandparent, nor issue of a grandparent, the estate passes to the next of kin in equal degree;

3. If the decedent leaves no spouse, issue, parent, issue of parents, grandparent, issue of a grandparent, nor kindred, then the estate shall escheat to the state for the support of the common schools; and

4. For the purpose of this section, the phrase "by right of representation" means the estate is to be divided into as many equal shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one equal share and the equal share of each deceased person in the same degree being divided among his issue in the same manner. The word "issue" means lineal descendants.